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Supreme Court, U.S.
FILED

No. 03-1430 APR 12 2004

IN THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY BLAIR SIBLEY,

Petitioner,

vs.

BARBARA SIBLEY,

Respondent.

On Petition for Writ of Certiorari to the Florida Third District Court of Appeal

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

First, whether the Florida Third District Court of Appeal-approved procedure for stripping Father of custody of his minor children and terminating all Father's parental rights violated procedural due process guarantees.

Second, whether the Florida Third District Court of Appeal-approved evidence for stripping Father of the custody of his minor children and terminating all Father's parental rights violated substantive due process guarantees.

Third, whether Florida Statute §61.30(12(c) violates equal protection guarantees by denying to Father's child of his second marriage equal support from Father to that of Father's children from his first marriage.

Fourth, whether setting Father's child support obligations at a level which bears no relationship to his ability to pay is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.

Fifth, whether the Supremacy Clause was violated when Father (i) was prohibited by a Florida State Court judge from suing in federal court and (ii) was sanctioned for failing to appear for a state court hearing when he was appearing in federal court pursuant to a subpoena at the same time in a different state.

Last, whether the Florida Third District Court of Appeal procedure approved by the Florida Supreme Court of issuing opinions *per curiam* without written decision violates Father's equal protection rights.

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

Petitioner, Montgomery Blair Sibley ("Father"), prays that a writ of certiorari issue to review the judgment and opinion of the Florida Third District Court of Appeal entered on December 3, 2003, as review by the Florida Supreme Court is prohibited by the Florida Rules of Appellate Procedure as detailed in Point VI, *supra*.

OPINIONS BELOW

The May 14, 1998, order permitting Father to relocate from Florida with his minor children of the Florida Circuit Court in and for Miami-Dade County, Florida is reprinted in the appendix hereto, *Appendix-4*.

The December 10, 2001, order temporarily changing primary physical custody of the minor children from Father to Respondent, Barbara Sibley ("Mother") and prohibiting the removal of the minor children to Washington, D.C. of the Florida Circuit Court in and for Miami-Dade County, Florida is reprinted in the appendix hereto, *Appendix-6*.

The March 27, 2002, decision of the Florida Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-13*.

The August 5, 2002, orders on child support of the Florida Circuit Court in and for Miami-Dade County, Florida are reprinted in the appendix hereto, *Appendix-15 and 23*.

The August 9, 2002, order terminating Father's rights in his minor children of the Florida Circuit Court in and for Miami-Dade County, Florida is reprinted in the appendix hereto, *Appendix-28*.

The December 3, 2003, order denying *per curiam* without written decision of the Florida Third District Court of Appeal is reprinted in the appendix hereto, *Appendix-35*.

The February 12, 2004, opinion of the Florida Third District Court of Appeal denying Father's motion for rehearing, rehearing *en banc*, reconsideration and for a written decision is reprinted in the appendix hereto, *Appendix-40*.

JURISDICTION

The order of the Florida Third District Court of Appeal was entered on December 3, 2003, affirming, without opinion and *per curiam*, the interlocutory and final orders of the Florida Family Court in *Sibley v. Sibley*, Case No.: 94-18177 FC. The order of the Florida Third District Court of Appeal denying Father's motion for rehearing, rehearing *en banc*, reconsideration and for a written decision was entered on February 12, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

(Set-out in Appendix)

U.S. Constitution, 14th Amendment, Section 1
U.S. Constitution, Article, VI, Clause 2
Florida Statute, §61.16
Florida Statute, §61.30(12)

STATEMENT OF THE CASE

In September 1994, Father and Respondent ("Mother") were divorced in the State of Florida. Father was designated the "primary residential custodian" of the three minor children of that marriage and after the division of property neither paid nor received child support or alimony. For the ensuing six years from 1994 to September 2000 Father, while living in Florida, remained the "primary residential custodian" of the three children and at all times was a nurturing father against whom no complaint was lodged.

In 1996, Father re-married and a child of that marriage was born in December 1997. In 1998, anticipating a relocation to the Washington, D.C. area, Father received an order from the Florida Family Court permitting such a relocation upon the sole condition of 45-day prior notice to Mother upon whom was placed the burden of securing a change in custody. *Appendix-4*.

In the spring of 2000, pursuant to the 1998 order, Father provided notice to Mother of his intent to relocate to the District of Columbia area with the minor children.

In flagrant disregard of his custody rights and in violation of the relevant court orders on custody and visitation, Mother refused to return the children to Father in July 2000 at the conclusion of their court-ordered summer vacation with her. Instead, Mother moved for a temporary change in custody in the Florida Family Court on July 27, 2000, solely upon the grounds that Father had abandoned the children. Significantly, Mother received no order permitting her to refuse to return the minor children to Father. Father vigorously sought an immediate hearing on her refusal to return the children to him from the Florida Family Court but that Court refused to conduct such a hearing. By such refusal, that court *de facto* transferred custody without the requisite procedureal or substantive due process safeguards of notice and an opportunity to be heard. Father's

repeated petitions for mandamus to the Florida Third District Court of Appeal to require a hearing and expedited determination of the custody issue were denied.

Seventeen months later, after hearings commenced in October 2000 and continued to December 2000, September 2001 and October 2001, the Florida Family Court finally entered on December 10, 2001, *verbatim* the proposed order submitted by Mother temporarily changing custody to Mother and – without notice that such relief was requested or being considered by the Court or permitting Father to be heard – prohibiting Father from seeing his children stating: "No visitation shall take place between the Former Husband and the minor children until therapy takes place". *Appendix-11.* Father has not been permitted to see his children since that time and in the interim two of the three children have reached the age of majority.

Father appealed the order on temporary custody to the Florida Third District Court of Appeal which rendered its decision based solely upon the lack of a proper record refusing to Father a hearing on his Florida Statutory right to have Mother bear the cost of the record on appeal. *Appendix-13.*

Twenty months later, traveling upon Mother's motion for sole parental responsibility, on August 5, 2002, Mother's motion to change custody and strip Father of all his parental rights was finally determined by the Florida Family Court, which refused to recognize or enforce Father's rights in his minor children. Additionally, again adopting *verbatim* Mother's counsel's proposed orders on child support and notwithstanding both the needs of Father's son born of his second marriage and Father's current economic condition ($36,000/year; negative net worth) and that of his former wife ($250,000/year; $1,000,000+ net worth) – the Florida Family Court ordered that Father pay to his former wife $100,000 in arrearages of child support calculated at $4,000 per month from July 2000, $4,000/month going

forward plus tuition to private schools and college for the three children in the amount of $175,000 for a total of $275,000. *Appendix 15 and 23.*

Father, on August 27, 2002, appealed twenty-one interlocutory orders and the August 2002 final orders of the Florida Family Court to the Third District Court of Appeal. After refusing to Father his request for leave to file a brief 20 pages in excess of the brief limitation – and thereby precluding Father from raising certain issues on appeal – oral argument on the appeal was finally held over a year later on October 8, 2003. Initially granting Father's motion to expedite the appeal, sixty days after oral argument on October 8, 2003, Father moved for an expedited decision which motion was filed on December 2, 2003. Noteworthy, the following day, in a *per curiam* decision without written opinion, the Florida Third District Court of Appeal affirmed all of the orders entered by the Florida Family Court. *Appendix-40.*

To show that the this Court has jurisdiction to review the judgements below on a writ of certiorari as required by Rule 14(g)(i) by Father's timely and properly raising the federal questions sought to be reviewed, Father states that each federal question sought to be reviewed was raised at the trial level in the first instance and subsequently at the appellate court level, save for Point VI which was raised and only could have been raised at the appellate level. Given the voluminous nature of the record, the method or manner of raising these federal questions and the way in which they were passed on by those courts with a summary of the pertinent quotations of specific portions of the record with specific reference to the places in the record where the matter appears are included in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

There are six compelling reason for granting this writ. First, the Florida Third District Court of Appeal-approved procedure for stripping Father of the custody of his minor children and terminating all Father's parental rights violated procedural due process as detailed below. Second, the Florida Third District Court of Appeal-approved required evidence for stripping Father of the custody of his minor children and terminating all Father's parental rights violated substantive due process guarantees as detailed below. Third, Florida Statute §61.30(12) violates equal protection guarantees by denying to Father's child of his second marriage equal support from Father. Fourth, setting Father's child support obligations at a level which bears no relationship to his ability to pay is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Fifth, Father (i) was improperly prohibited by the Florida State Court judge from suing in federal court and (ii) was improperly sanctioned for failing to appear in state court when he was under federal subpoena to appear in federal court at the same time in a different state. Sixth, the Florida Third District Court of Appeal procedure of issuing opinions *per curiam* without written decisions violates Father's equal protection rights.

I. The Florida Family Court Proceedings Violated Father's Procedural Due Process Guarantees

The course of the proceedings below from the timing of the setting of hearings to the entry of the final orders by Judge Lando – and orders not entered by Judge Lando – singularly and collectively establish a denial of procedural due process to Father in this termination of fundamental parental rights case.

A. Delay in Conducting Change in Custody Proceedings Violated Due Process

Mother's Emergency Motion to Temporarily Transfer custody of the minor children to her was filed on July 27, 2000. Judge Lando did not conclude the hearing on this "emergency" and "temporary" motion until October 8, 2001, some **430** days later. Indeed, it was not until October 8, 2001, that Judge Lando finally permitted Father to present his case to her. Moreover, Judge Lando did not enter her order on this motion until December 12, 2001, over **500** days after the filing of the original "Emergency" motion. Furthermore, Mother's Petition For Modification of Primary Physical Residence and Sole Responsibility filed on July 19, 2001, was not resolved until August 9, 2002, some **386** days later.

The Due Process guarantee of a hearing at a "meaningful time" and (i) a 500 day delay in resolving an "emergency motion" and (ii) a 386 day delay in resolving a custody motion, are simply irreconcilable. The delay is particularly grotesque when the minor children are removed from Father – the primary residential custodian during that time – based solely upon (i) the subsequently demonstrated spurious allegation of the "emergency" motion and (ii) placed with a parent – who the Guardian *ad litem* recognized – as failing "to properly encourage the love and support of the children for their father. [Mother]'s failings could be construed as having an alienating effect on the children. [Mother] should be counseled with respect to her obligation in this regard and follow up should be structured to make sure that she adjusts her behavior accordingly."

This Court has recognized a "fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). "Choices about marriage, family life, and the upbringing of children are among associational rights [the Supreme] Court has ranked as 'of basic importance in our society,' . . .. rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M. L. B. v. S. L. J.*, 519 U.S. 102, 116 (1996) (internal citation omitted).

As a general rule, therefore, before parents may be deprived of the care, custody or management of their children without their consent, due process – ordinarily a court proceeding resulting in an order permitting removal – must be accorded to them. See *Stanley*, 405 U.S. at 649, 651. A parent may not lawfully be deprived of the custody of his or her child without a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Here, Father was stripped by Judge Lando of his custody, relationship and management of his minor children without any meaningful hearing for over 500 days through the use of discretion in controlling her hearing calendar. Crucial too is that this is not a situation where the minor children have been removed on an emergency basis – indeed no complaint has ever been registered regarding these minor children and Father's primary residential custodian care of them during the six years he acted in that capacity. Contrariwise, this action arises upon the mother's spurious "Emergency" motion to transfer custody and Father's emergency motion to compel Judge Lando to enforce her own orders vesting custody in Father.

Instead of recognizing the clear rights Father had as primary residential custodian, Judge Lando failed to hear any part of Father's side for over **430** days but allowed a *de facto* modification of custody to continue for 15 months exclusively with Mother – who was objectively demonstrated by the Guardian *ad litem* to be dedicated to disaffecting Father's children from him – an objective she subsequently accomplished. Plainly, procedural due process requires more than delaying a hearing on an emergency petition for modification of custody for 15 months yet *de facto* granting that petition during that interval.

B. Judge Lando Improperly Limited Father's Presentation of Evidence

When Father was finally permitted to present evidence in opposition to Mother's Emergency Motion for Temporary Custody **438** days after that motion had been filed, Judge Lando expressly limited Father's ability to present his case by her directions. In particular, Judge Lando instructed Father at the beginning of his case-in-chief on October 8, 2001: "Only thing I would ask is try not to be repetitious with regard to testimony that I have already heard. . . . I have directed you not to repeat, and that is my ruling." And indeed, Judge Lando repeatedly instructed – **caustically** and with **sarcasm** – Father to stop his testimony as she had already heard it. Moreover, time and again during these proceedings, Judge Lando silenced Father and denied him the ability even to proffer his objections to preserve them for appellate review.

C. Judge Lando Abdicated Her Responsibility By Her Verbatim Entry of the Proposed Orders from Mother's Counsel

Of all that is appalling in this case, none equals the fact that both (i) the December 12, 2001, order of Judge Lando on Mother's Emergency Motion for Temporary Custody and (ii) the August 2002 orders on Contempt were the ***verbatim*** adoptions by Judge Lando of the proposed orders submitted by Mother's counsel upon which Father did not have an opportunity to comment prior to entry. As such, they must be reviewed as Judge Lando patently abandoned her pivotal rule as an "impartial judge" in this matter.

D. Judge Lando's Termination of Father's Parental Rights Violated Father's Fundamental and Due Process Rights

The *de jure* and *de factor* termination of Father's parental rights contained in the December 12, 2001, order violated Father's fundamental and procedural due process rights.

That order, at paragraph 4 states, "No visitation shall take place between the Former Husband and the minor children until therapy takes place." *Appendix-11*. Of great moment is that Mother's Emergency Motion for Temporary Custody did not contain any request for such relief – i.e. the *de facto* and *de jure* indefinite suspension of Father's rights in his minor children.

Hence, and first, this order is defective as Father's parental rights were terminated without notice to him that Judge Lando was considering such a course or an opportunity to be heard and present evidence (such as his own psychologist) on the issue of whether for some unknown reason, Father had become so unfit as a parent that termination of all contact with his children and counseling was necessary.

Second, there was no proof to justify this order by Judge Lando and strikingly the proof was just the opposite. The guardian *ad litem* concluded in his December 15, 2000, report to Judge Lando that:

> Both [Father] and [Mother] are very bights (sic), articulate, caring an compassionate individuals. Both have substantially contributed to their children's welfare. . . . Both parents are adequate and competent and if anything happened to either parent, this Guardian would have not (sic) hesitancy in recommending to the Court that the other parent assume full responsibility over the children.

As no extreme circumstances were (i) plead, (ii) proved or (iii) placed in the December 12, 2001, order by Judge Lando the termination of Father's parental rights violated Father's due process and fundamental rights as a parent.

This Court has held that when the state seeks to change or affect the relationship of parent and child in furtherance of a

legitimate state interest, a Fourteenth Amendment liberty interest is implicated and the state should adhere to rigorous procedural safeguards. *Santosky v. Kramer*, 455 U.S. 745 (1982) (involving termination of parental rights); *Stanley v. Illinois*, 405 U.S. 645 (1972) (determining custody rights of unwed father). *Accord*: *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (the custody, care and nurture of the child reside first with the parents); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty guaranteed by the Fourteenth Amendment includes the right to establish a home and bring up children).

Such safeguards were grotesquely absent here.

E. Lack of Notice to Father of the Expansion of the Hearings Beyond the July 27, 2000 Allegations Violated Father's Due Process Rights

Father was denied procedural due process by Judge Lando's conduct of the hearing on Mother's Emergency Motion to Transfer Custody by having no notice of the expanded scope of the hearing prior to the continuation of the December 15, 2000, hearing 283 days later on September 24, 2001. As such, Father was not able to prepare adequately so that he could have a meaning opportunity to be heard. The factual allegations in support of Mother's July 27, 2000, Emergency Motion for Temporary Custody are specifically limited to allegations concerning Father's alleged "abandonment" behavior that occurred between May 2000 and July 27, 2000. Plainly, Mother's Emergency Motion for Temporary Custody could not make allegations about Father's future behavior. Moreover, at the initial hearing on this motion held on October 24, 2000, Mother's counsel's opening statement limited the proof of Father's behavior justifying a change in custody to the period May 2000 through July 2000. Hence, Father prepared and presented his case based upon this express limitation on the factual basis for the change in temporary custody.

Indeed, at both the October 24, 2000, and the December 15, 2000, hearings, the direct examination of Father by Mother covered only the area that could be covered, i.e., whether he "physically, financially and emotionally" abandoned the minor children from May 2000 until July 27, 2000 as alleged by Mother. As such, Father was clearly expecting the proof to be limited to that which was alleged in the only pleading at issue – Mother's Emergency Motion for Temporary Custody which was limited to events occurring in the summer of 2000.

Nonetheless, Judge Lando at the continuation of the hearing on Mother's Emergency Motion for Temporary Custody on September 24, 2001 – without notice to Father and over Father's express objections to this expansion of the scope of the hearings beyond the boundaries of the pleadings – allowed Mother to delve into the issues that occurred not only between May 2000 and July 27, 2000, but up until the hearing on September 24, 2001.

As such, Father, on notice for a trial concerning issues that occurred during the summer of 2000, all of a sudden found himself confronted with a trial on the un-noticed issues from summer 2000 to the fall of 2001. Indeed, Judge Lando's expansion of the scope of the hearing on September 24, 2001, is plainly evidenced at paragraph "K" of the December 12, 2001, order wherein Judge Lando makes findings regarding the Christmas 2000 visitation by the minor children to Father in Maryland. *(Appendix-8)*.

Thus, Father found himself on September 24, 2001, on the stand answering questions – and unprepared to do so – about topics he was given no notice were to be the subject of the inquiry or serve as a basis to take his children from him. Such practice violates fundamental procedureal due process guarantees.

F. Judge Lando Utilized Stale Evidence Which Caused Her To Mis-Recollect the Testimony

In the December 12, 2001, order, Judge Lando, held that "All testimony taken in this hearing shall be adopted and made a part of the hearing on the Former Wife's Petition for Modification of Primary Physical Residence". *(Appendix-11)*. Hence, when the hearings continued on the remaining motions on June 1, 2002, Judge Lando incorporated by reference the testimony she heard given under different motions and petitions to matters she was hearing as much as 654 days after the testimony was first given. Father objected to this procedure.

G. The Bias of Judge Lando Against Father Violated Father's Due Process Rights

The repeated real bias – or even if only apparent – of Judge Lando against Father is plain and violated Father's right to an "impartial tribunal" to determine his fundamental rights in his children. In *Peters v. Kiff*, 407 U.S. 493 (1972) this Court stated, "Moreover, even if there is no showing of actual bias in the tribunal, this Court has held **that due process is denied** by circumstances that create the likelihood or the **appearance of bias**."

Here those circumstances are documented in the six motions to disqualify Judge Lando which singularly and cumulatively demonstrated Judge Lando's bias against Father in this most sensitive of issues – the custody of his children and include:

1. Judge Lando was exposed to privileged communications between the parties and repeatedly used them in determining this case;

2. Judge Lando refused to allow Father to be

heard before ruling;

3. Judge Lando (i) engaged in *ex parte* communications with Mother's counsel, (ii) entertained an *ore tenus* motion for contempt which had not been noticed for hearing, (iii) ruled on that motion for contempt without permitting the Father to be heard in opposition and (iv) all during a hearing without a stenographer in violation of Florida Rules of Judicial Administration, Rule 2.070(b)+(d) and over the express objections of Father;

4. Judge Lando again refused to allow Father to be heard before sanctioning him for failing to produce his second wife's pay-stubs – when those documents were not within his custody or control as he had legally separated from his second wife and thus had no access to her pay-stubs under Maryland law ;

5. Judge Lando's favoring of Mother over Father in the setting of hearings. Thus, though Father made pursuant to Fla. Stat. 61.16 a "Motion for Attorney Fees" on October 31, 2001, Judge Lando refused to set – and indeed never did set – a hearing. However, when Mother made the same motion on July 2, 2002, Judge Lando set the hearing date 51 days later on August 27, 2002.

6. Judge Lando entered *verbatim*, the proposed order of Mother on this very sensitive issue of custody and support which resulted in Father's incarceration for seventy-five days.

Most egregiously, and alone violating due process rights, at the hearing continued to October 8, 2001, during Father's direct testimony, Judge Lando not only made a sarcastic remark directed to Father, she subsequently admitted to this onerous and unethical behavior on the record. Judge Lando, by belittling Father through sarcasm, denied to Father a fair hearing and as

such due process rights were not accorded Father.

H. Florida Public Policy Requires Attorney Fees and Costs To Be Borne By Mother

Florida Statute, §61.16 – "Attorney's fees, suit money, and costs" states in pertinent part:

> (1) The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals.

In *Levy v. Levy*, 483 So.2d 455 (3rd DCA 1986), the Florida Third District Court of Appeal stated "[O]ne of the underlying principles upon which fees are allowed at all in domestic cases, that is, to equalize the otherwise disparate financial abilities of the respective spouses to retain counsel."

Father initially sought *pendente lite* appellate attorney fees and costs from Judge Lando by motion dated October 31, 2001. Judge Lando, through her administrative assistant, advised Father that Judge Lando would not consider such matters before August 2002 – well after the subject appeal would have been decided. Moreover and significantly, though asked to do so, Judge Lando in December 2001 refused to enter a submitted agreed-by-counsel-as-to-form order stating her intention to not consider the matter of attorney fees and costs until August 2002. To date, though August 2002 has come and gone, Judge Lando has refused to consider this October 29, 2001, motion for pendente lite attorney fees and costs.

On September 9, 2002, Father again moved for pendente

lite appellate attorney fees and costs before Judge Lando. Again, Judge Lando refused to set this motion for hearing and has not otherwise ruled upon it. The law under Florida Statute, §61.16 and the lack of hearing by both Judge Lando and this Court on the issue of attorney fees and costs has forced Father to represent himself in violation of the plain public policy of the State of Florida. As such, the entire proceeding is in error and must be reviewed for that reason alone.

II. The Florida Family Court Proceedings Violated Father's Substantive Due Process Guarantees

As Mr. Justice Stewart, with whom Mr. Justice Rehnquist joined, concurring in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1997), stated, "One of the liberties protected by the Due Process Clause, the Court has held, is the freedom to 'establish a home and bring up children.' *Meyer v. Nebraska*, supra, 262 U.S., at 399. If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.' *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645."

Here, the pleadings and the substantive proof relied upon by the Family Court to break-up Father's relationship with his children was "without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest" and accordingly "intruded impermissibly" on the private realm of family life which "the state cannot enter". As such, Father's fundamental liberty interest of Due Process was violated by the termination of his rights in his children.

First, as to the pleadings, on October 8, 2001, at the

conclusion of Mother's direct case on her Motion for Temporary Custody, Father made a motion for directed verdict. That motion was based upon Mother's fantastic admissions during cross-examination by Father that (i) Father did not financially abandon the minor children, (ii) Father did not physically abandon the minor children and (iii) did not emotionally abandon the minor children all in direct contradiction of the allegations of Mother's Emergency Motion for Temporary Custody.

Mother's subsequent Petition for Modification of Primary Physical Residence and Sole Responsibility is likewise devoid of any pleading supporting a finding of *"significant inadequacy"* by Father in the care of the minor children. To the extent that pleading alleges alienation by the Father from his children, it must be noted that (i) Father was under a court order not to have any contact with the minor children since December 2001 and (ii) Judge Lando refused to issue any order of visitation for over 500 days by not ruling on Father's motion modify the visitation schedule until after she had ordered Father not to have any contact with his children.

The primary allegation upon which the petition for sole responsibility is based on Father's alleged failure to pay child support – an improper basis in all events to justify a change in primary physical residence or parental responsibility. Thus the non-financial allegations relied upon by Mother as grounds for modification when reviewed simply do not add up to facts sufficient to justify a change in custody and awarding sole parental responsibility to Mother. As such, the change in custody violated Father's Due Process and Equal Protection guarantees and his fundamental rights as a parent.

Second, ignoring the procedural defects in the pleadings described above, the orders themselves and the factual record do not permit the legal conclusion changing the residential custodianship of the minor children from Father. Neither the

order of December 12, 2001, nor the order of August 9, 2002, were supported by the record below and accordingly were wholly deficient and inadequate to support a change in primary residential custody and termination of Father's parental rights. Indeed, both orders (i) fail to make the requisite findings of Florida Statute §61.13, (ii) only make findings of fact in a conclusory manner, and (iii) ignore the favorable evidence below to Father and against Mother. Moreover, when Judge Lando does make specific findings of fact – parroting the proposed order of Mother's counsel – the findings are simply contrary to the evidence. As such, there was no "showing" to sustain a finding that Father was "unfit" to continue as primary residential custodian.

This Court must review in their entirety the hearings held on October 24, 2000, December 15, 2000, September 24, 25, 26, 2001, October 8, 2001, June 4, 5, 6, 7 and July 1, 2001 in support of Mother's motions to transfer custody to try to find substantial and competent evidence to "show" Father's "unfitness" to be a parent. Father is left trying to prove here the negative – which is like swatting at unseen sand flies and simply cannot be done.

III. Father's Support Obligation Offends Equal Protection

The net result of continued enforcement of the Marital Settlement Agreement as Judge Lando did by her orders of support of August 9, 2002, is that the three children of Father's first marriage will benefit disproportionately greater than Father's child from his second marriage. Indeed, given the practical effect of that order – to destitute Father and leave nothing for his support of his son from a subsequent marriage – such a result is noxious to the sentiments of Equal Protection and thus Florida Statute §61.30(12) and the orders of support cannot be sustained under constitutional principals.

Only one other federal court has addressed the issue of equal protection and state statutes setting child support obligations. In *P.O.P.S. v. Gardner*, 998 F.2d 764 (9th Cir. 1993), the court affirmed a dismissal of a constitutional challenge to a Washington state child support schedule which – similar to Florida's scheme found at §61.30(12) – excluded subsequently born children of other relationships in determining the level of child support to be ordered. *Id.* at 769. In upholding the constitutionality of the child support schedule against an equal protection challenge, the Ninth Circuit held that the "schedule does not directly and substantially interfere with fundamental rights". *Id.* at 770. However, unlike Florida Statute §61.30(12), the Washington State schedule expressly required the courts to consider and if necessary deviate from the schedule if children from other relationships were present. *Id.* at 769.

Notably, Florida does not permit such a deviation, expressly prohibiting such consideration at §61.30(12)(c): "The issue of subsequent children under paragraph (a) or paragraph (b) may only be raised in a proceeding for an upward modification of an existing award and may not be applied to justify a decrease in an existing award." (Emphasis added).

This Court must look to a directly analogous determination of equal protection guarantees found at *Gomez v. Perez*, 409 U.S. 535 (1973). There, this Court addressed the issue of "whether the laws of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children." *Id.* at 535. This Court first found that "the controlling law is the Texas common-law rule that illegitimate children, unlike legitimate children, have no legal right to support from their fathers." *Id.* at 536-537. In striking down the quoted law of Texas, this Court held:

> Under these decisions, a State may not invidiously discriminate against illegitimate

> children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." *Id.*, at 175, 92 S.Ct., at 1406.

Id. at 537-538.

Here, Florida has established a statutory right for children of a first marriage to needed support but explicitly has denied children – whose only crime was to be subsequently born of a different parent – the same right to needed support. For Florida to do this is "illogical and unjust" if only because if Father's child of the subsequent marriage had been born out-of-wedlock, *Gomez* would have precluded the disparate treatment §61.30(12) sets. The subsequently born child certainly does not need less food than the prior children. But that is plainly what the State of Florida mandates. In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) this Court noted "the basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent." Here, it is the child born of a second marriage that is being penalized the same way an illegitimate child was being penalized in *Weber*.

In *Pohlmann v. Pohlmann*, 703 So. 2d 1121 (5th DCA 1997) the only Florida case which has addressed and upheld this issue of the constitutionality of §61.30(12), in his well-worded dissent, Judge Harris stated "The issue in this case, quite simply, is whether it is a "legitimate government interest" for the State,

through its legislative process, to prefer certain children over others. Because I believe that it is not, I would hold §61.30(12), Florida Statutes, unconstitutional under the provisions of Article I, § 2, of the Florida Constitution."

This Court must note that Father's child of his second marriage sought to raise the constitutionality of Florida Statute §61.30(12), through a declaratory judgment action filed in the U.S. District Court of the Southern District of Florida. That court dismissed the action upon the *Rooker-Feldman* and *Younger* doctrines. The Eleventh Circuit Court of Appeals, in an un-published opinion, in *Sibley v. Lando*, Case No. 03-14915 affirmed the dismissal stating "We conclude that the *Younger* doctrine required the district court to abstain for the reasons the court expressed in its September 23 order. . . We find no abuse of discretion; an amendment would be futile." *Appendix-43.* As such, this Court must accept certiorari to determine the constitutionality of §61.30(12) as no other forum exists to address this statute which so significantly impinges upon the right to support of children born of subsequent marriages.

IV. Father's Support Obligations Violate Due Process

Father maintains that there is a constitutional limitation upon the level of child support that a state can order a Father to pay – and incarcerate when such payment is not forthcoming as happened here – when such amount bears no relationship to Father's assets and ability to pay such amounts and directly effects his ability to raise his children. "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, [Due Process] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public

interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Meyer v. State of Nebraska*, 262 U.S. 390,399 (1923).

Here, on August 4, 2001, Father filed his Supplemental Petition for Modification of Child Support alleging a "substantial change in circumstances not contemplated at the time of the Final Judgment which was sufficient, material, involuntary and permanent in nature, requiring a modification of [Father]'s child support obligations". In the Orders on Support entered a year later on August 9, 2003, Judge Lando ignored the Florida statutory support guidelines and instead ordered Father to pay (i) $4,000/month from July 2000 to Mother for child support as required under the 1994 Martial Settlement Agreement and (ii) all private educational expenses of the children – a sum which now exceeds $400,000. This, Father is suppose to do on his income recognized by Judge Lando of $36,000/year.[1] This issue was raised, and review was denied, by this Court in Case Number 03-682.

Thus setting child support obligations at an absurd amount is "arbitrary or without reasonable relation to some purpose" and has denied to Father the due process right to raise his children. Instead, stripped of that right, the children's mother now makes the sole determination of what schools they are to attend and Father must pay that amount regardless of his wishes. Such a result does not comport with Substantive Due

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[1] While recognizing Father's inability to pay, the Florida Third District Court of Appeal substituted a legal fiction that Father's could compel his father, Harper Sibley, Jr., to pay Father's child support and educational obligations. Noteworthy is that when Father sought to enforce this "right to compel" by suit against Harper Sibley, Jr., the Florida Family Court denied him the right to do so.

Process guarantees as the State has stripped Father of his fundamental right to raise his children through the punitive imposition of absurd child support obligations.

V. Father was Improperly Prohibited From Suing in Other Courts and Was Improperly Sanctioned

On May 29, 2001, Judge Platzer for Judge Lando entered an *ex-parte* order which, among other holdings, enjoined Father from "litigating issues with respect to the trust and the payment of fees and costs from the trust assets in any forum other than the 11th Judicial Circuit in and for Miami-Dade County, Florida". Plainly, such an order has no legal justification and is particularly onerous as the Children's Trusts are a product of the New York Surrogate Court from where they arose and over which that Court – and not Judge Lando sitting in the 11th Judicial Circuit in and for Miami-Dade County, Florida – has unquestionable jurisdiction. Subsequently, on February 11, 2003, Judge Lando entered an order which at ¶6 stated "The [Appellant here] is ordered to not commence new legal proceedings in any other forum against [the former wife]."

Indeed, such orders violate this Court's express holding in *Donovan v. City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964), "That right [to federal court access] was granted by Congress and cannot be taken away by the State. The Texas courts were without power to take away this federal right by contempt proceedings or otherwise."

Significantly, Father sought a declaratory judgement that Judge Lando's February 11, 2003, order violated his rights as recognized in *Donovan v. City of Dallas*. The Eleventh Circuit ruled on March 8, 2004, in *Sibley v. Lando*, 03-13340, that Father's remedy was a state court appeal of the February 11, 2003, order "and then, if he is unhappy with the result, to continue his appeal on to the United States Supreme Court. . .We conclude this claim was improperly brought by [Father] in

federal district court . . . because the *Rooker-Feldman* doctrine bars this action in federal court." Hence, Father's only remedy to enforce his rights recognized in *Donovan v. City of Dallas* is this instant petition.

Additionally, pursuant to a federal subpoena properly issued and served upon Father on April 15, 2002, Father was required to appear and testify in a trial in the Eastern District of Virginia on April 25, 2002. On April 25, 2002, Father appeared as subpoenaed and testified as noted *Hazbun v. Rodriguez*, 191F.Supp.2d 685 (E.D. Va. 2002) and *Hazbun v. Rodriguez*, 200 F.Supp2d 603 (E.D. Va. 2002). The matter was continued by that court to April 26, 2002, and Father was instructed to remain available if further testimony was necessary from him. The trial concluded before that court in the afternoon of April 26, 2002.

On the same day – April 26, 2002 – Judge Lando conducted a hearing on one day's notice to Father, and sanctioned Father for failing to appear. Father, who did not have notice of the hearing, could not attend the April 26 hearing in Miami as he was under federal subpoena to appear and was appearing in Virginia at that time. Hence, the order sanctioning Father for not appearing for the hearing on April 26, 2002, violated the supremacy clause and must be reviewed by this Court.

VI. The Florida Supreme Court and the Third District Court of Appeal Violated Father's Equal Protection Right

This Court must accept certiorari of the questions presented below as (i) Florida Supreme Court review is prohibited by *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980) and (ii) Federal Court review has been denied as detailed in 03-1205 pending before this Court on the grounds that the *Rooker-Feldman* and *Younger* doctrines preclude Federal Court review of these issues. *Appendix-35*. Accordingly, a denial of review here

denies to Father a substantive review in any court of his allegations of constitutional violations by the rules of procedure of the Florida Supreme Court and practice of the Third District Court of Appeal as documented below.

A. The *Per Curiam* Affirmance Violates Equal Protection By Denying Florida Supreme Court Review of Florida District Courts of Appeal Conflicts

By entering a *per curiam* affirmance without written opinion, the Third District Court of Appeal violated Father's Equal Protection guarantees as Father was treated differently than similarly situated litigants in other cases without explanation of the disparate treatment. Moreover, pursuant to Florida Supreme Court rule such a practice of denying a written decision arbitrarily creates two classes of appellants in Florida: (i) those who get a written opinion thereby creating a right to Florida Supreme Court conflict-review and (ii) those who do not get a written opinion thereby creating an un-reviewable and separate body of law which conflicts with the express rulings of the Federal and Florida Courts and thus denies equal protection of the laws.

This rule and practice violates equal protection guarantees as it prohibits Florida Supreme Court review of such decisions under Florida Rules of Appellate Procedure, Rule 9.030(a)(ii). In *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980), the Florida Supreme Court held, "Accordingly, we hold that . . . the Supreme Court of Florida lacks jurisdiction to review *per curiam* decisions of the several district courts of appeal of this state rendered without opinion . . . when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court." (Emphasis added).

In this case, such conflicts, which now can never be

reviewed by the Florida Supreme Court, are numerous and only partially identified below given the page limitations of this petition. As such, the *per curiam* affirmance without written decision practice of the Florida Third District Court of Appeal as approved by the Florida Supreme Court violates equal protection guarantees and this practice must be reviewed by this Court.

B. The *Per Curiam* Affirmance Violates Equal Protection By Creating Intra-Third District Conflicts

As important, the conflict between the reported decisions of the Florida Third District Court of Appeal and the result in this case violates Equal Protection Guarantees. Remarkably, the same Third District Court of Appeal recognized in *Velez v. The City of Coral Gables*, 819 So.2d 895 (Fla.App. 3 Dist. 2002), under an Equal Protection rationale, "[t]he interpretation urged by the City and the Mallos also raises the spectre of denial of equal protection of the law, as suggested by the Velezes. An administrative agency has the burden of providing a reasonable explanation for inconsistent results based upon similar facts." (Citations omitted).

Likewise, the Third District Court of Appeal has the same burden to provide a "reasonable explanation for inconsistent results based upon similar facts." To hold otherwise, would exempt the Third District Court of Appeal from the same equal protection obligations of *stare decisis* it recognized must be accorded in the administrative arena. Clearly, equal protection guarantees do not stop at the door to the judicial branch of government.

Here, the "inconsistent results" from "similar facts" are summarily detailed, *infra*, given the page limitations of this petition by citing the facts in this case juxtaposed against the reported decisions involving "similar facts" but resulting in "inconsistent results".

A. Judge Lando repeatedly interfered with Father's attempt to proffer evidence: Prior Third District Court of Appeal rulings that reversal is mandatory. *See*: *Cason v. Smith*, 365 So.2d 1042 (3rd DCA 1978); *Musachia v. Terry*, 140 So.2d 605, 608 (3rd DCA 1962).

B. Judge Lando (i) never issued the required order for trial under Florida Family Law Rules, Rule 12.440 and (ii) never held the required pre-trial hearing under Florida Family Law Rules, Rule 12.200(b). Prior Third District Court of Appeal rulings that reversal in such cases is mandatory: *Thomas v. Feinberg* 745 So.2d 500, 501 (3rd DCA 1999); *Gelatt v. State, Dept. of HRS*, 585 So.2d 477 (3rd DCA 1991); *Ivans v. Greenbaum*, 613 So.2d 130(Fla.App. 3 Dist. 1993).

C. The orders at issue were the *verbatim* adoptions by Judge Lando of the proposed orders submitted by Mother's counsel. Prior Third District Court of Appeal rulings that reversal in such cases is mandatory: *Waldman v. Waldman*, 520 So. 2d 87, n.4 (3rd DCA 1988).

D. Father's parental rights were terminated without notice to him that Judge Lando was considering such a course or an opportunity to be heard and present evidence. Prior Third District Court of Appeal rulings that reversal in such cases is mandatory *Scheer v. Scheer*, 132 So.2d 456, 458 (3rd DCA 1961); *Berlin v. Berlin*, 369 So.2d 434,(Fla.App. 3 Dist. 1979); *Kranis v. Kranis*, 313 So.2d 135 (Fla.App. 3 Dist. 1975); *Childress v. Childress*, 309 So.2d 581(Fla.App. 3 Dist. 1975).

E. Father was denied a hearing on whether he was entitled to attorney fees. Prior Third District Court of Appeal rulings that reversal in such cases is a hearing is mandatory: *Levy v. Levy*, 483 So.2d 455 (3rd DCA 1986); *Bailey v. Bailey*, 392 So.2d 49, 52 (3rd DCA 1981); *Seitz v. Seitz*, 471 So.2d 612, 615 (3rd DCA 1985).

F. Judge Lando utilized privileged evidence. Prior Third District Court of Appeal rulings that reversal in such cases is mandatory: *Blattman v. Williams Island Associates, Ltd.*, 592 So.2d 269 (Fla.App. 3 Dist. 1991).

G. Father's motions as Trustee to dissolve the temporary injunctions entered below were ignored by Judge Lando and in all events failed to comply with Fla.R.Civ.P. 1.610. Prior Third District Court of Appeal rulings that reversal in such cases is mandatory: *Miami v. Coll*, 546 So.2d 775 (3rd DCA 1989); *Ginsberg v. Ginsberg*, 738 So.2d 1032, footnote 1 (Fla.App. 3 Dist. 1999); *Kallman v. Kallman*, 623 So.2d 1213(Fla.App. 3 Dist. 1993); *SeaEscape, Ltd., Inc. v. Maximum Marketing Exposure, Inc.*, 568 So.2d 952 (Fla.App. 3 Dist. 1990).

H. One day notice of a hearing was not proper for an out-of-state party. Prior Third District Court of Appeal rulings that reversal in such cases is mandatory; *Henzel v. Golstein*, 349 So. 2d 824 (3rd DCA 1977); *Goral v. State*, 553 So. 2d 1282 (3rd DCA 1989).

I. The law relating to modification of child support prohibits the imposition of a support order which is three times Father's present annual income as ordered by Judge Lando and as such that order must be vacated. Prior Third District Court of Appeal rulings that reversal in such cases is mandatory; *Bickett v. Bickett*, 579 So. 2d 149 (3rd DCA 1991); *Blum v. Blum*, 382 So.2d 52 (Fla. 3d DCA 1980); *Suarez v. Suarez*, 514 So.2d 428, 429 (Fla. 3d DCA 1987), rev. denied, 525 So.2d 881 (Fla.1988); *Farrington v. Farrington*, 390 So.2d 461 (Fla. 3d DCA 1980), pet. for review denied, 399 So.2d 1142 (Fla.1981); *Dunstan v. Weatherspoon*, 505 So.2d 23 (Fla. 3d DCA 1987); *Grabow v. Grabow*, 442 So.2d 262, 263 (Fla. 3d DCA 1983).

J. Mother and Father shared "joint parental responsibility" for the minor children. Prior Third District Court of Appeal rulings that stripping Father of that responsibility

required reversal in such cases is mandatory; *Tamari v. Turko Tamari*, 599 So.2d 680, 681 (3rd DCA 1992); *Meloan v. Coverdale*, 525 So.2d 935 (3rd DCA 1988).

K. The Contempt Orders fail to make the requisite findings of fact and as such depart from the essential requirements of law in this regard. Prior Third District Court of Appeal rulings that reversal in such cases is mandatory. *Vereen v. Spears*, Case No.: 3D02-1476 (3rd DCA 2002).

L. Here, the Third District Court of Appeal premised Father's ability to pay not on his assets but upon the assets of his "very wealthy father". Prior Third District Court of Appeal rulings that reversal in such cases is mandatory when reliance upon funds of family members is the basis for finding "ability to pay"; *Thilem v. Thilem*, 662 So.2d 1314 (3rd DCA 1995); *Sol v. Sol*, 656 So.2d 206 (3rd DCA 1995); *Bob v. Bob*, 310 So.2d 328, 330 (Fla. 3d DCA 1975); *Edwards v. Edwards*, 615 So.2d 178 (3rd DCA 1993); *Seilkop v. Seilkop*, 575 So.2d 269 (Fla. 3d DCA 1991).

Taken separately or together, these twelve examples of "inconsistent results" from "similar facts" merely scratch the surface of the Equal Protection and Due Process violations here. To permit the Third District Court of Appeal to be its own watch-dog for insuring equal protection of the laws by prohibiting review of its decisions by any superior court simply does not comport with the strict demands of *stare decisis*. Moreover, given that some 67% of the cases decided by the Third District Court of Appeal are *per curiam* without written opinions, the magnitude of the Equal Protection violation is potentially huge, as the facts in this case indisputably illuminate.

Accordingly, this Court must review the practice of the Third District Court of Appeal in issuing *per curiam* affirmances without written opinion to determine if such a practice violates equal protection guarantees.

CONCLUSION

Father lost all care, custody and management of his minor children not because he was ever found to be unfit as a parent. He has lost this fundamental right through a process and upon evidence which cannot withstand constitutional muster for compliance with due process of law. Additionally, Florida has enacted a statute which invidiously discriminates against children born of a subsequent marriage and forces Father to deny to his child of his second marriage the same level of support – and thereby the ability to express his love and affection – as the level Florida mandates be given to children of his first marriage. Indeed, by setting Father's child support obligations at 133% of his gross income, Florida has destituted Father and forced Father to deny to his child of his second marriage the same benefits that the children of his first marriage – two of whom have now reached the age of majority – enjoyed when they were of similar and developmentally crucial age.

Moreover, the Supremacy clause cannot sanction Florida's prohibiting Father from seeking relief in Federal Court and sanctioning Father when he failed to appear at a one-day's noticed state-court hearing when under federal subpoena in another state. Last, Florida's procedure for denying review of appellate decisions rendered *per curiam* without written opinion creates both inter-district and intra-district conflicts of law which result in equal protection violations. Accordingly, this petition for a writ of certiorari must be granted to review the procedural and substantive violations of Father's fundamental parental and constitutional rights.

Respectfully submitted,

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